

Krishnan (Migration) [2019] AATA 2745 (11 June 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Pushpawanita Krishnan
VISA APPLICANT:	Mr Kuldeep Kumar
CASE NUMBER:	1806213
DIBP REFERENCE(S):	BCC2015/3171782
MEMBER:	Russell Matheson
DATE:	11 June 2019
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 11 June 2019 at 11:56am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – money transfers – period of cohabitation – care and support to sponsor’s children – sound knowledge of each other’s lives – site visit to applicant’s parents’ home in India – interview by Departmental officers – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.212, 309.213, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 January 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicant (applicant) is a 33-year-old male national of India. He applied for the visa on 29 October 2015 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 because the delegate was not satisfied the applicant is the spouse of the sponsor. The sponsor seeks review of the delegate's decision.
5. The review applicant appeared before the Tribunal on 12 December 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant and five witnesses that included two of the sponsor's children and three of her friends.
6. The review applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
7. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

8. BACKGROUND

9. The applicant is a 33-year-old national of India who was previously married in February 2013 and divorced on 3 October 2015. There are no children from the marriage.
10. The sponsor is a 49-year-old Australian citizen who was previously married in June 1994 and divorced on 13 August 2015. There are three children from the marriage.
11. The applicant was granted a tourist visa (TR676) on 10 October 2011 and arrived in Australia on 19 October 2011. The applicant departed Australia on 8 June 2015 on a bridging visa WC030.
12. The applicant was granted a bridging visa (WD040) on 18 September 2013. He was granted a further bridging visa (WC030) on 19 September 2013 after applying for a partner combined visa (UK820/BS801) with his ex-spouse. He withdrew the visa application on 12 May 2015.
13. The applicant had two tourist visa applications refused on 28 December 2015 and 14 April 2016.
14. The applicant and sponsor claim to have first met on 16 January 2013 in Australia. They further claim that they committed to a shared life together in December 2014 while living together in Australia. The parties were married on 18 October 2015 in India.

CONSIDERATION OF CLAIMS AND EVIDENCE

15. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act
16. The Tribunal has before it the Department of Immigration (the Department) file relating to the applicant; its own file; and a copy of the Department's decision provided by the sponsor to the Tribunal.
17. The evidence the parties and witnesses provided at the Tribunal hearing is recorded throughout this decision record.

Whether the parties are in a spouse or de facto relationship

18. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
19. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

20. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant provided a copy of the marriage certificate registered in India indicating the parties were married on 18 October 2015 in Karnal India. There is no evidence before the Tribunal to indicate that the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
21. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below, the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
22. The Tribunal had the benefit of the applicant's and the sponsor's oral evidence and that of five witnesses. The Tribunal gave all the evidence provided by the parties at the Tribunal hearing and the information contained in the Departmental and Tribunal files due regard. The Tribunal considered evidence given by the sponsor, the applicant and witnesses to be detailed, consistent and credible.

23. The Tribunal acknowledges the delegate's concerns set out in the primary decision record. The Tribunal discussed these with the applicant and the sponsor in the course of the hearing and the Tribunal is satisfied that the explanations offered are plausible.

Are the other requirements for a spouse relationship met?

24. *Financial aspects*

25. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
26. The sponsor in evidence claimed that since the applicant returned to India in June 2015 it made it difficult for them to exhibit clear sharing of expenses during separation. The sponsor stated that when living together in Australia before the applicant departed, the parties shared their financial resources paying the rent, household bills and day-to-day living expenses. The sponsor explained that the parties had a joint ANZ account and although it showed limited transactions on the statement provided that indicated a pooling of financial resources, the parties made deposits into the joint account individually. The sponsor submitted that the joint account is a progress saver account and acquires bonus interest when no withdrawals are made during the month. The parties stated that they utilised their joint account to pool their resources and used other means such as cash when sharing the day-to-day living expenses. The sponsor also submits that she still maintains the joint account although physically separated from the applicant and funds deposited into the account are limited due to the financial support she provides to her children and husband overseas.
27. Additionally, the sponsor gave evidence that the parties have continued to share their financial resources despite the fact they are living in separate countries. The sponsor further states that she has transferred money to the applicant in India during separation (TF folios 422 to 426). The sponsor gave evidence that she is assisted by her son who helps her with the money transfers due to her lack of knowledge of the process. She further stated that the money is transferred from her son's debit card to the applicant and was previously sent via his brother to give to the applicant. The sponsor's son who was a witness at the hearing also provided evidence confirming this was the case. The sponsor further stated that the applicant paid the cost of her airfare to India for their marriage ceremony. The Tribunal accepts that the parties are prepared to share their financial resources.
28. The applicant and sponsor provided limited evidence regarding the financial aspects of their relationship, including evidence of any pooling of financial resources, sharing of day-to-day expenses or shared financial commitments for their life together as spouses.
29. The parties have no joint liabilities or major assets together. There is little evidence before the Tribunal to indicate that the parties share or pool their financial resources. There is no evidence before the Tribunal that one person in the relationship owes any legal obligation in respect of the other. There is little evidence before the Tribunal to support that the parties share day-to-day living expenses or pool their financial resources.
30. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The Tribunal finds based on the evidence before it, that the sponsor has provided significant financial support to the applicant. The Tribunal places some positive weight on this aspect of the relationship.

31.

32. Nature of the household

33. The Tribunal has considered the nature of the household, including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
34. The Tribunal accepts there is a degree of difficulty in establishing a joint household when the parties live in separate countries at the present time. The parties provided evidence to the Tribunal of living together in Australia from February 2014 to June 2015.
35. The parties provided a number of documents including, but not limited to, utility bills, car insurance, newspaper account, and health cover addressed to the sponsor and applicant individually at their residential address when living together in Australia. The parties also provided as evidence of their cohabitation together in Australia a joint tenancy agreement for a period of six months. The sponsor explained that although the tenancy agreement was only for six months it is not unusual for a tenancy agreement to extend beyond the stated period, and further submitted that the parties did in fact live together at the same residential address in Australia for approximately 18 months. The Tribunal places little weight on these documents as convincing evidence of the couple establishing a joint household and living together.
36. The parties gave evidence and the sponsor submitted that when living together in Australia the household duties and responsibilities were shared between the couple and the sponsor's children. The sponsor provided evidence in her statutory declaration that they shared the cooking, washing, vacuuming and dishwashing chores amongst themselves and there was no set routine. The sponsor submitted that when the applicant had a day off he would share his cooking skills as a chef with her children, teaching them how to cook different meals. The sponsor also stated that the applicant provided care and support to her children as if they were his own. The sponsor's son and daughter who were witnesses at the review hearing gave evidence consistent with the applicant and sponsor in regard to the nature of the household. The two witnesses also provided detailed evidence of the applicant's care and support that he provided to them and their mother. The parties submitted after they married in India they lived together as husband and wife in the applicant's family home and the sponsor helped the applicant's mother with the cooking and housework.
37. The Tribunal notes that the parties provided photographs of their travel together visiting different tourist attractions in India along with their air tickets, train tickets and hotel booking in July 2016. Although this is not compelling evidence of cohabitation the Tribunal accepts they were in each other's company and stayed together in India.
38. The applicant and sponsor provided evidence that they have notified government agencies such as Centrelink and the Australian Tax Office that they are in a spousal relationship.
39. Based on the evidence presented by the parties, the Tribunal accepts that they lived together, have established a joint household together and shared the responsibility of the housework when the parties were together in Australia and India. The Tribunal accepts that the applicant provides care and support to the sponsor's children. The Tribunal places some positive weight on this aspect of the relationship.

40. Social aspects

41. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.

42. The parties have provided a selection of photos taken of themselves with each other, with friends and family and on different occasions in both Australia and India. The photos indicate that the applicant and the sponsor have undertaken some joint social activities, have been in the company of each other's friends and families and have travelled together. The Tribunal has given some weight to the submitted photographs as evidence of the social aspects of the claimed relationship. The Tribunal accepts the parties' relationship is supported by both their families. The parties provided extensive photographic evidence of their traditional wedding in India in 2016 and their Indian marriage certificate. The parties provided documentary evidence of their travel in India, providing receipts for travel and accommodation. The parties provided documentary and oral evidence of travelling to different locations in India including but not limited to Kulu Manali, the Taj Mahal in Agra, Chennai and Malaysia in early 2018.
43. The applicant and sponsor also provided statements and statutory declarations and five witnesses (two of the applicant's children, and three friends) attended the review hearing in person. The Tribunal places some weight upon the statements and declarations although some give more of an insight into the inception, development and the nature of the relationship. The Tribunal found the attendance of the five witnesses convincing in regard to the applicant and sponsor being in a genuine and continuing spousal relationship.
44. Overall, the Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in a marital relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

45. Commitment

46. The Tribunal has considered the nature of the parties' commitment to each other including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
47. The applicant and sponsor claim to have first met on 16 January 2013 in Australia. They further claim that they committed to a shared life together in December 2014, living together in Australia. The parties were married on 18 October 2015 in India. The applicant provided a copy of the marriage certificate registered in India indicating the parties were married on 18 October 2015 in Karnal India. There is no evidence before the Tribunal to indicate that the marriage is not valid. The Tribunal accepts that the applicant and sponsor are lawfully married. To date, the relationship has lasted for more than four and a half years. The Tribunal accepts that the parties are currently living in separate countries and have spent limited time together.
48. The parties gave evidence that they have already lived together for two years in Australia before the applicant returned to India in June 2015, and that they intend to live together as a family unit according to their Indian culture and beliefs when the applicant returns to Australia. The parties also provided evidence that they wished to hold a wedding ceremony in Australia with family and friends who were unable to attend their wedding in India. The Tribunal found the applicant's, the sponsor's and the five witnesses' evidence convincing in regard to the couple being in a genuine and continuing relationship and living together previously in Australia and living physically apart at the present time.
49. The parties presented documentary evidence of continued daily contact during periods of separation and a sound knowledge of each other's lives, family, living arrangements, health issues (particularly in relation to the sponsor's current health issues), personal history and future together. The parties provided evidence that they communicate on a daily basis via

telephone, and Facebook messenger applications. The parties also provided letters and documentary evidence from the sponsor's local general practitioner, clinical psychologist and social worker outlining the sponsor's ill health and support required to maintain her household and care for her children. The parties provided evidence that they believed they were in a long-term relationship and this was supported by the sponsor's two children and three other witnesses who gave evidence at the review hearing. Overall, the Tribunal found their evidence convincing and genuine.

50. The sponsor submitted that she is struggling with the lack of emotional and physical support that she is able to receive from the applicant due to living in separate countries and the support, care and advice given by the applicant to her children. The sponsor provided evidence that she travelled to India to be with the applicant in October 2015 for the purpose of their further unification as a couple through their marriage in India. She further submitted that she travelled to India in July 2016 to visit the applicant, coinciding with his birthday. The applicant provided evidence that he travelled to Malaysia in January 2018 to reunite with the sponsor and her children. He further states that he visited the sponsor's birthplace and met the sponsor's sisters and family in Malaysia who are fully supportive of their relationship. The parties provided evidence of staying with the sponsor's niece and husband during their stay in Malaysia. The Tribunal accepts that the parties are prepared to maintain a genuine and continuing spousal relationship during separation.
51. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long-term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and genuine.
52. The Tribunal is satisfied the applicant and the sponsor derive a strong degree of companionship and emotional support from each other that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long-term one.
53. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship and that they do not live separately and apart on a permanent basis.
54. **Other issues**
55. The delegate raised issues regarding a site visit to the applicant's parents' home in India on 1 May 2017. The delegate placed significant weight on the applicant's parents' spontaneous responses when queried by Departmental officers about the applicant's marriage to the sponsor. The applicant's parents stated that they intended to find the applicant an Indian wife after he obtained permanent residency and had already shortlisted candidates. The delegate raised further concerns in regard to the applicant's parents being unaware of the applicant's marriage during the site visit; given the fact the applicant's parents were in the parties' wedding photographs and had made statutory declarations in October 2016 that they had attended his wedding in November 2015. The delegate further states that the documents appear to be bogus statements not made by the applicant's parents and the wedding ceremony was not genuine.
56. The applicant gave evidence at the review hearing that his parents are illiterate and were confused when interviewed by the Department. The applicant further submits through his migration agent that when the Department visited his parents at their residence in India, there was a miscommunication regarding the purpose of the visit and the required information. He further submits that the Departmental officers who conducted the interview spoke in a dialect that was unknown to both his parents and their confusion was

exacerbated by the officer's intermittent use of English during the interview. He further submits that that his parents were under the impression that the officers were from an organisation who arrange marriages on commission, a common practice in India. The applicant further stated that his parents were at the couple's wedding and is fully aware of their relationship and is very supportive of them. The parties gave evidence that they only informed people that were close to them they were married and did not want to inform others that they would be separated after their marriage in India when the sponsor returned to Australia because it is not culturally accepted. The applicant's parents provided a written statement confirmed by affirmation (TF folio 432) dated 14 September 2018 reiterating the evidence provided by the applicant. The Tribunal also queried the applicant about why, if his parents were illiterate, their statements dated 17 October 2015 were in English. The applicant gave evidence that his parent's statements were translated into English by the person who typed the statements at the courthouse.

57. The evidence before the Tribunal is problematic based on the fact the Tribunal is aware the Department conducts site visits in a professional manner with the highest integrity to obtain clarity in regard to relationships being genuine. The Tribunal also accepts that the applicant's parents may have been confused when being interviewed and they provided a signed affidavit as evidence outlining the circumstances of their confusion. The Tribunal is unable to determine if this is the case because it was unable to query the applicant's parents personally at the review hearing. There is no evidence before the Tribunal that there has been any bogus document produced in relation to the visa application or that the wedding of the applicant and sponsor is bogus or not valid. Based on the evidence provided, the Tribunal finds the weight of the evidence is in favour of the applicant and sponsor being in a genuine and continuing spousal relationship.

58. Findings

59. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
60. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
61. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor at the time of the application was an Australian citizen who had turned 18. Therefore the applicant meets cl.309.212 and cl.309.213.
62. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

63. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211, cl.309.212 and cl.309.213 of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).